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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL GRISET; GRISET CAMPAIGN COMMITTEE;
SANTA ANA PROGRESS COMMITTEE,
Petitioners,

v.

FAIR POLITICAL PRACTICES COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of California

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BRIEF OF THE CALIFORNIA POLITICAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE CALIFORNIA POLITICAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The California Political Attorneys Association ("CPAA"), a bipartisan association of more than eighty-five California attorneys who practice campaign, elections, and political law, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

CPAA's membership represents and advises hundreds of clients—Republicans, Democrats, and independents; incumbents and challengers; ballot measure committees which support or oppose initiatives and referenda at the state and local levels; political action committees of associations, corporations, and labor organizations; individual and business entity donors; and grass roots organizations of all stripes.

Most of these individuals and organizations must comply with—and often rely upon CPAA members to advise them with respect to compliance with—California's speaker identification requirements for political mass mailings. While speaker identification requirements might be viewed as full employment acts for political attorneys, CPAA files this brief because the extensive experience of its members with enforcement of the California requirements has shown them to have an unduly burdensome effect on political expression in California.

Individual CPAA members have represented clients in numerous enforcement proceedings brought by the California state agency which is responsible for interpretation and enforcement of these compelled speech requirements. The CPAA itself has appeared as an *amicus curiae* in this case before the California Supreme Court, challenging the constitutionality of the California requirements. *Griset v. Fair Political Practices Commission*, 8 Cal.4th 851 (1994). The CPAA also has filed briefs *amicus curiae* before this court in *McIntyre v. Ohio Elections Commission*, 67

Ohio St.3d 391 (1993), *cert. granted,* 114 S.Ct. 1047 (1994) (No. 93-386), and in several California appellate court proceedings, to provide the courts with the insight of those who have represented a wide range of clients in matters involving various California and national political regulations.

SUMMARY OF REASONS TO GRANT REVIEW

California's identification requirement for political speakers shows how complex and burdensome such requirements can become. The statute (California Government Code Section 84305) and its implementing regulations are so difficult to understand that political speakers act at their peril if they seek to speak without first retaining specialized legal counsel. In numerous administrative enforcement actions under the California statute, unsophisticated participants in electoral campaigns have been penalized heavily for indavertent violations in which anonymity was not even an issue. More sophisticated candidates and campaign committees have also been penalized under circumstances where the public was fully informed of the identity of those involved.

The statute under review by this court in *McIntyre v. Ohio Elections Commission, supra,* may be described as a "first generation" speaker identification statute. The California statute upheld by the California Supreme Court in *Griset,* presents the "next generation" of speaker identification requirements—requirements that are highly content-oriented.[1] The technical complexity of compliance, coupled with the penalties for very minimal violations, have a chilling effect on political speech.

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[1] California's own version of a "first generation" speaker identification statute (former California Elections Code Section 29410) was held unconstitutional in 1980 in *Schuster v. Municipal Court,* 109 Cal.App.3d 887 (1980). *See* fn. 8, *infra. Schuster* followed by 20 years this Court's earlier striking down of another California speaker identification statute in *Talley v. California,* 362 U.S. 60 (1960).

The Ohio statute in *McIntyre* prohibited speaker communication without identification. The California statute in this case not only prohibits such communication without identification, but also contains exactingly-detailed content and placement requirements, including the requirement that a speaker identify and characterize its own affiliations. Unlike the limited enforcement authority of the Ohio Elections Commission in *McIntyre*, the California enforcement agency, the Fair Political Practices Commission ("FPPC"), has wide latitude to scrutinize, and disapprove, a speaker's characterization of its own affiliations. The FPPC may impose significant fines and penalties, far higher than those Ohio imposed in the statute reviewed in *McIntyre*.[2]

The California speaker identification statute is overbroad. In addition to candidates in their own political mailings, individuals or groups who qualify as "committees" because they sometimes support or oppose candidates or ballot measures must also identify themselves on any mailings of more than 200 identical or nearly identical pieces of literature sent through the mail. This requirement applies to mailings whether or not a particular mailing "expressly advocates" the election or defeat of a candidate or measure, is a fundraising mailing, or is mailed for some other lawful purpose by the individual or committee.[3]

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[2] The FPPC is authorized to prosecute violations of the Political Reform Act by §§ 83115 through 83116.5 of the Government Code. Violations are punishable by monetary penalties of up to $2,000. The FPPC assesses such penalties on a per-violation basis, without regard to fault. § 83116(c). The FPPC's administrative enforcement decisions are published by California Continuing Education of the Bar, cited in this brief as [year] CEB FPPC Enforcement Decisions [page].

[3] California Government Code section 89510 permits a committee to spend funds for activities, including mailings, which are "reasonably related to a governmental, legislative, or political purpose." In an FPPC enforcement action, *In the Matter of Trice Harvey, Committee to Elect Trice Harvey, and Mark Abernathy* (Fair Political Practices Commission No. FC-86/512, 1987-1989 CEB FPPC Enforcement Decisions 123), discussed *infra*, a fund-

Moreover, the ancillary statutes which comprise the statutory identification scheme require the speaker to identify and disclose its sponsors or affiliations. The statute also requires that the identification appear *on the outside,* and for some mailings *also on the inside* of the mailing, in defined type size and with specific legibility and color contrast mandates.

Failure to comply precisely with each of these requirements, and to use the precise name of the group or committee which sends the mailing, has resulted in significant fines and penalties—far higher than any that could be imposed by Ohio in the statute under review in *McIntyre.* The FPPC has imposed such fines on the least sophisticated groups in the political process. The FPPC has held in some of its enforcement actions that the violator's failure to correctly and exactingly identify the speaker, or its affiliations, on the *outside* of the mailing may have caused the recipients of the mailing to open "an unwanted communication."

CPAA's experience with the California statute underscores the constitutional infirmity of prohibitions on anonymity in political speech and the overbreadth of such speaker identification requirements. As this Court held in *Talley v. State of California, supra,* anonymous literature has long played an important role as a vehicle for the expression of political views that would otherwise never be expressed. Speaker identification requirements are also constitutionally infirm because they are a form of compelled speech that impermissibly burdens a political speaker's message.

The California Supreme Court failed to address the overbreadth of Section 84305 in its decision. As a re-

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raising solicitation was the subject of a $1,000 fine. (*Infra* at fn.9.)

For example, a candidate or a political committee not controlled by a candidate could produce and mail a fundraising appeal for a charity under section 89510. If the mailing failed to include the proper speaker identification, the sender of the mailing could be fined up to $2,000 for violation of section 84305.

sult, the threat of enforcement continues to impair the freedom of speech of countless individuals and committees in California—not simply candidates and their controlled committees.[4]

In its recent decision in *U.S. v. Nat'l Treasury Employees Union* (1995) —— U.S. ——, 1995 WL 68442 (U.S.), relief to the plaintiffs could be granted to an entire class of persons without the necessity to reach the possible overbreadth issue as to others not within the class. However, in the instant case Petitioners' relief is inextricably tied to the overbreadth challenge they raise.

Section 84305 is overbroad because it reaches not only electoral communications by candidates and other "committees" but also communications which are not expressions of advocacy related to any election, nor to the endorsement, support of, or opposition to any candidate or any ballot measure. Section 84305 is also overbroad because it reaches communications by all "committees" such as fundraising solicitations, solicitations on behalf of charitable organizations, and indeed, any other communication that may be lawful for the committee to undertake. (See specific case examples discussed *infra.*)

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[4] The California Court of Appeal issued an opinion which, in effect, declared Section 84305 unconstitutional as to anyone except candidates and their controlled committees, by construing the statute to apply only to candidate committees. However, when the California Supreme Court granted review, the Court of Appeal decision was superseded and vacated. (California Rules of Court, Rule 976(d).) In upholding Section 84305 as to Petitioners and other candidates and their committees, while refusing to reach the statute's application to all others, the California Supreme Court left the statute fully intact. As a result, it is currently being enforced by the California Fair Political Practices Commission. Under the California State Constitution, Art. III, Section 3.5, no state agency may refuse to enforce a statute on the basis of its perceived unconstitutionality, unless and until an appellate court has declared the statute unconstitutional. Once the California Supreme Court vacated the Court of Appeal's decision, there was no longer an appellate court decision to bar prosecution as to persons other than candidates.

The statute reaches any communication made by such committees of 201 or more pieces of mail. The price of such a *de minimis* communication may be as little as $25, given available postal rates and printing costs.

The statute penalizes precisely those less sophisticated committees which are the least likely to be aware of the complexity of the statutory scheme, and the most likely to be chilled in the exercise of their speech rights by the kind of rigid state enforcement demonstrated in this brief. The statute is also overbroad because it reaches demonstrably true speech as well as arguably false, libelous, or "deceptive" speech.

In this brief, Amicus CPAA will provide the Court with ". . . flesh and blood legal problems with data relevant and adequate to an informed judgment . . ." (*U.S. v. Nat'l Treausry Employees Union, supra,* dissenting opinion of Justice O'Connor, Slip Op. at 17.)[5] These "flesh and blood" examples demonstrate the evils of the "seeming threat or deterrence to constitutionally protected expression" for which this Court has applied the "strong medicine" of invalidation for overbreadth. *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973).

The rationale used by the California Supreme Court below found that the compelled speaker identification requirements might prevent or discourage ". . . *deceptive* . . ." mailers. The state court acknowledged, however, that the requirement may ". . . deter candidates from making mass mailings. . . . Faced with a requirement that they identify themselves in all election-related mass mailings, candidates may choose not to send certain mailings at all." *Griset v. Fair Political Practices Comm., supra,* 8 Cal.4th 851, 863 [see Appendix A, A-14-15, of Petitioners' Petition for Writ of Certiorari herein].

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[5] For example, fully 15.2% of the FPPC's reported enforcement prosecutions during the period 1976-1992 for campaign-related violations of California's Political Reform Act included violations of Section 84305. Several of these prosecutions are discussed *infra.*

This Court should hold the California statute unconstitutional on its face because it, and similar statutes in other states, impermissibly infringe on rights protected by the First Amendment by prohibiting anonymity in political speech and by their impermissible overbreadth as to non-anonymous political speech. The prohibition of anonymity does not serve any public interest sufficiently compelling to justify the infringement on the First Amendment, and is not narrowly tailored to serve any interest that has been advanced to justify compelled disclosure.

ARGUMENT

I. CALIFORNIA'S REQUIREMENT FOR SPEAKER IDENTIFICATION IN POLITICAL SPEECH IS UNCONSTITUTIONAL ON ITS FACE.

Amicus CPAA agrees with Petitioners' argument that California's speaker identification requirements constitute a flat ban on anonymity in mass mailed political speech, and that such a ban is prohibited by the First Amendment and by this Court's decision in *Talley v. State of California, supra,* and cases cited therein. The First Amendment right of anonymity recognized in *Talley* applies with at least equal vigor to political speech regulated by the California statutes.

This brief will not repeat the arguments in Petitioners' Petition for Certiorari. In this Part I, CPAA will address the chilling effect of California's highly technical regulatory scheme as applied in practice by the state's enforcement agency.

A. California's Statute Illustrates the Complexity to Which Political Speaker Identification Mandates Are Prone, and Their Resulting Burdens on Speech.

California's compelled speaker identification statute is instructive in the present case because it is an example of the extreme complexity to which "next generation" rules mandating identification by political speakers are prone.

The statute, Section 84305 of the California Government Code, is part of California's Political Reform Act.[6] As adopted by the state's voters in 1974, Section 84305 established a relatively simple requirement that political mass mailings bear a postal bulk permit number that could be traced, or, at the option of the sender, the sender's name and address. A series of statutory amendments and interpretive regulations followed. However, the key amendment transformed the voluntary option of sender identification into a requirement, and a long slide down a slippery slope of increasingly complex regulation began. Each amendment and interpretive regulation that followed has made the rules governing how senders must be identified more complex, more confusing, and more intrusive. The trend toward ever more bewildering complexity shows no signs of abating, with further amendments being regularly urged on the state legislature and the FPPC. The current version of Section 84305 is set forth in the Appendix to this brief.

The complication and confusion is compounded when the numerous statutes and regulations defining Section 84305's terms are considered. The result is a daunting obstacle to individuals and organizations who wish to express their views on an election issue, by means of even a relatively small mailing to other voters. Before expressing their views, those persons must make their way through a mine field of confusing, multi-pronged, cross-referenced definitions and requirements in numerous statutes and regulations.[7]

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[6] The Political Reform Act of 1974, as amended, is found in California Government Code, Title 9, Chapters 1 through 11, Sections 81000-91015, inclusive. The act is a comprehensive regulatory scheme which, among other things, requires reporting of campaign contributions and expenditures in a manner similar to that of the Federal Election Campaign Act, provides auditing and enforcement procedures, and creates the Fair Political Practices Commission to interpret and enforce the provisions of the act. All statutory references are to the California Government Code unless otherwise noted.

[7] Regulations promulgated by the Fair Political Practices Commission under the authority of § 83112 of the California Govern-

Those who fail are subject to penalties of up to $2,000 per violation in administrative enforcement actions brought by the Fair Political Practices Commission (§§ 83115-83116.5); or, for willful violations, to misdemeanor conviction with a maximum fine of $10,000 and up to one year of incarceration (§ 91000; Calif. Penal Code § 19). The $100 penalty imposed on Ms. McIntyre for violation of the Ohio statute appears mild by comparison.

Persons covered by § 84305 are any "candidate" or "committee."[8] The definition of "candidate" in § 82007 includes, as one would expect, any individual qualified for the ballot. It also includes any individual who has received any "contribution" or made any "expenditure" with a view to eventual nomination or election to any state or local office, whether or not the individual has decided on a particular office. "Committee" as defined in § 82013 means "any person or combination of persons" that receives or makes contributions or expenditures over specified threshold amounts. (See Appendix A.)

Thus, not just the typical campaign committee organized to support a candidate or ballot measure is subject to the identification requirement. Under this broad definition, an informal group of citizens, or even a lone individual who makes "independent expenditures" also qualifies as a "committee" and is subject to the speaker identification requirement.

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ment Code are found in California Code of Regulations, Title 2, Division 6, §§ 18101-18954, inclusive, and are cited herein as "FPPC Regulation § ———."

[8] Section 84305 at one time simply applied to any "person," like the Ohio statute, reading "No person shall make an expenditure for the purpose of sending a mass mailing unless . . . ." (§ 84305 as amended by Calif. Statutes 1978, Chapter 1408.) This broad application was narrowed to "candidate" and "committee" in 1984 (Calif. Statutes 1984, Chapter 1368) in response to the decision in *Schuster v. Municipal Court*, 109 Cal.App.3d 887 (1980) in which the court invalidated a speaker identification requirement in California's Elections Code § 29410 on the grounds that it was an overly-broad infringement on the right of anonymity protected by the First Amendment. That statute, like Ohio's, applied to every "person" and all forms of printed material concerning an election.

The next question for these political speakers is whether the requirement applies to their communication. The term "mass mailing" is defined in § 82041.5 as "over two hundred substantially similar pieces of mail . . . ." FPPC Regulation § 18435 limits this to mail sent within a calendar month. (See Appendix A.)

The next questions concern the technical requirements of compliance. Some of these, although detailed, are apparent on the face of § 84305, which requires speaker identification as follows: (i) full committee name, street address, and city must appear; (ii) although a post office box may be used if the organization's address is a public record with the Secretary of State; (iii) on the outside of each mail piece;[9] (iv) and on at least one insert un-

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[9] Actual FPPC enforcement cases illustrate this point. *In re Carmen Sabatino* (Fair Political Practices Commission No. 90/369, 1993-95 CEB FPPC Enforcement Decisions 31). Mr. Sabatino was a perennial "also-ran" candidate. As part of his political activism in the community, Mr. Sabatino published an "alternative newsletter" that was mailed to as many as 300 subscribers and distributed for free. When Mr. Sabatino later ran for office, he reprinted an issue of his newsletter and mailed it to 7,000 voters. Inside, he inserted his campaign literature. The FPPC imposed a $2,000 fine for this improper "mass mailing," while finding:

> Although it did not contain the name and address of respondent on the outside of the pieces mailed, it did contain his name and address as publisher on the second page of the newsletter. The campaign literature enclosed in the newsletter also contained respondent's name and address on its outside. Neither of these identifications, however, were visible from the outside of the mail pieces. (*Id.* at p. 2.)

Another example of the overly technical nature of the statute and its enforcement is: *In the Matter of Assemblyman Trice Harvey, Committee to Elect Trice Harvey, and Mark Abernathy* (Fair Political Practices Commission No. FC-86/512, 1987-1989 CEB FPPC Enforcement Decisions 123). There, the FPPC imposed a fine of $1,000 upon the respondents for sending a *fundraising letter* which did not comply with the California speaker identification requirements.

The mass mailing was a fundraising letter sent by Assemblyman Harvey's committee. The format of the solicitation was a letter from then-California Governor George Deukmejian, endorsing Assemblyman Harvey. Harvey was clearly identified as the endorsee,

less the sender is only a single candidate or committee, in which case identification is required only on the outside of each mail piece; (v) in no less than 6-point type; and (vi) in a color or print which contrasts with the background so as to be easily legible.

The technical requirements of compliance, however, also include determining and using the appropriate name for the sender, a determination that can be quite difficult. One such requirement is apparent from the face of § 84305: "(c) If the sender . . . is a controlled committee, the name of the person controlling the committee shall be included . . . ." The term "controlled committee" is defined in § 82016 as:

> a committee which is controlled directly or indirectly by a candidate [defined in § 82007, see discussion above] or state measure [defined in § 82051] proponent [defined in § 82047.6 by reference to the definition in California Elections Code § 3502] or which acts jointly [formerly defined in FPPC Regulations § 18585, repealed in 1976, Register 76, No. 16] with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.

Including the name of the controlling candidate or proponent in the identification is only a start toward full compliance.[10] First, if a committee's principal activity is

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and the mailing contained solicitation materials directing contributors to make checks payable to Harvey's committee and to return the checks in a "business return envelope" addressed to Harvey's committee. However, the mailing did not comply with the requirements of California law because it did not include Harvey's full committee name and address on the *outside* envelope.

[10] In another Section 84305 enforcement action, the FPPC imposed a $1,000 fine on a county supervisor who mailed to voters a tabloid-style campaign mailing that identified a different "sender" than the statute required, but otherwise complied with the location,

the support of or opposition to a ballot measure, § 84107 requires that reference to support or opposition to the ballot measure number be included "in any reference to the committee required by law." [11]

Second, if the sending committee qualifies as a "sponsored committee," the sponsor's name must be included in the identification on the mailing. There is no reference to this special identification requirement for "sponsored" committees *in § 84305*. It is only by reading several other provisions together that the requirement is revealed. Section 84102 provides, in relevant part, that "[i]n the case of a sponsored committee, the name of the committee shall include the name of its sponsor." The requirement for identification of the sponsor is made applicable to mass mailings by virtue of section 84106, which provides: "(a) Whenever identification of a sponsored committee is required by this title, the identification

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size, and legibility requirements of the statute. (*In the Matter of Barbara Riordan and "Barbara Riordan for Supervisor Committee"* (Fair Political Practices Commission No. 88/583, 1987-1989 CEB FPPC Enforcement Decisions 881). The mailing identified the sender as "Yucaipa Citizens for Supervisor Riordan Re-election." The FPPC found that Yucaipa supporters of the Supervisor did in fact conceive, design and print the newsletter. However, it imposed a fine because, under § 84305 and FPPC Regulation § 18435, "Barbara Riordan for Supervisor Committee," the exact name of the committee that paid for the mailing, should have been identified.

[11] In another § 84305 enforcement case, the FPPC fined a local, grass-roots citizens committee $2,000. *In the Matter of Alliance for Mission Viejo—Yes on Measure A, Yes on Recall* (Fair Political Practices Commission No. 90/163, 1990-1992 CEB FPPC Enforcement Decisions 183). A citizens group paid for and sent a mass mailing containing a political statement by a well-known local figure, Orange County Supervisor Tom Riley, regarding *his* position on the impact of a local ballot measure, a position with which the citizens group agreed. The mailing used Riley's letterhead with his name and address. The name and address of the citizens group did not appear on the mailing. When the committee learned that the statute required its name and address to appear on the mailing, it promptly reported its omission to the FPPC. Although the violation was inadvertent and voluntarily reported, the FPPC imposed the maximum administrative fine of $2,000.

shall include the full name of the committee . . . ." [12] (These statutes are set forth in full in Appendix A.)

Under section 82048.7, a committee is deemed to be "sponsored" by any "person" that collects contributions for the committee through payroll deductions or dues from its members, officers, or employees; provides administrative services to the committee; participates in setting fundraising and spending policies for the committee; or contributes 80% or more of the committee's funds.

Finally, FPPC Regulation § 18435 defines "sender" as ". . . the candidate or committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing . . . . " (See

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[12] In yet another Section 84305 enforcement action, the FPPC imposed a $4,000 fine on a local, gross-roots group of voters, whose members were unaware of the fine points of campaign mailing identification. *In the Matter of Riverside Tomorrow—Riverside Landowners & Arlington Heights Landowners Association Committee* (Fair Political Practices Commission No. 88/239, 1990-1992 CEB FPPC Enforcement Decisions 731). Their committee sent two mass mailings which failed to include the name of the committee's sponsor in the name of the committee. The first mailing urged a "no" vote on a local ballot measure, and contained the sender identification "Riverside Tomorrow-A Citizens' Lobby" together with the sender's address. However, that identification lacked the name of the *sponsoring* organization, the Arlington Heights Landowners Association.

The second mailing bore the same sender name and address. However, this mailing also contained a cover letter with the name and logo of the "Arlington Heights Citizens Association." The FPPC's enforcement decision, while noting that "the committee did not have any prior experience with campaign committees or reporting requirements," listed as "factors in aggravation":

> . . . the mailers' identification deprived the public of knowledge of [Arlington Heights Landowners Association]'s involvement in the mailers. This information would have allowed the voters to better evaluate the mailers' contents. . . . Furthermore, the Measure E mailing was identified on the inside as being from the Arlington Heights *Citizens* Association rather that [sic] the Arlington Heights *Landowners* Association. (*Id.* at 737.)

Appendix A.)[13] This provides for even greater complications when two or more candidates or committees are involved in the political "mass mailing."

Only after working through all of these definitions can a speaker subject to these identification requirements determine what form the required identification must take.

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[13] In another Section 84305 enforcement case, the FPPC imposed a $2,000 fine on the California Judges Association's Committee for Public Responsibility ("CJA-CPR"), formed to oppose a statewide ballot measure which would have capped state judge's salaries. *In the Matter of California Judges Association—Committee for Public Responsibility* (Fair Political Practices Commission No. 89/186, 1990-1992 CEB FPPC Enforcement Decisions 27). Once again, anonymity and accountability were never the issues.

The committee designed and produced 180,000 "Dear Friend" postcards urging recipients to join with several organizations, *including the California Judges Association,* in opposing the ballot measure. Individual judges signed and sent the postcards to voters in their jurisdictions. The committee paid most of the postage costs. The FPPC found that the California Judges Association violated the law because:

> Neither the front or the back of the postcard contained the name, street address and city of the CJA-CPR committee, which qualified as the "sender" of the mass mailing pursuant to Regulation 18435. (*Id.* at 32.)

The FPPC noted as a "Factor in Aggravation" that "recipients of the 'Dear Friend' postcards were not aware that CJA-CPR was the true sender of the mailing rather than the individual judge who signed the postcard." The committee of judges was fined, notwithstanding the FPPC's finding in mitigation that:

> The CJA-CPR members responsible for designing and reviewing the postcard were relatively inexperienced in political campaigns and were not aware of the sender identification requirement for mass mailings. The committee believed that since the postcards were sent by individual judges that they did not require committee identification. . . . (*Id.* at 32.)

II. CALIFORNIA'S SPEAKER IDENTIFICATION STATUTE IS UNCONSTITUTIONALLY OVERBROAD IN ITS APPLICATION TO PROTECTED POLITICAL SPEECH.

A. California's Statute Compels Speech that Impermissibly Burdens the Speaker's Message, Further Infringing on the First Amendment Freedoms of Political Speakers.

There is another aspect of speaker identification requirements that was not present in *McIntyre*. Unlike campaign finance reporting requirements, Section 84305 affirmatively compels all covered speakers to disclose the speaker's identity and often the speaker's affiliations, *all as part of the communication itself*. The required statements are thus content-based, compelled speech.

Section 84305 compels all persons and organizations that are "committees" and wish to engage in written political expression, including personal correspondence, to disclose their identity as part of the communication itself.[14] The effect of this requirement is to "burden[] a speaker with unwanted speech" during the course of the speaker's own message. *See Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 800 (1988). Because it "[m]andat[es] speech that a speaker would not otherwise make," Section 84305 is a content-based regulation of speech, "subject to exacting First Amendment scrutiny." *Id.* at 795, 798; *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

In *Riley v. National Federation of the Blind of N.C., supra*, this Court struck down a North Carolina statute that required professional fundraisers for charitable organizations to tell potential donors the percentage of contributions collected during the previous twelve months

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[14] Section 84305 compels candidates and committees that send as few as 201 substantially similar pieces of mail to identify themselves on the mailing, and where applicable, list the names of persons "controlling" or "sponsoring" them. See section I.A. of this brief.

that had actually gone to charity. Observing "the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored," the Court held that the statute was a content-based regulation of speech, and could not withstand "exacting First Amendment scrutiny." *Id.* at 798, 800.

A statute compelling speech fails the narrow tailoring requirement when government has the option of itself publishing information obtained from mandatory disclosure forms but elects instead to compel a private speaker to include the information in the speaker's own message. *Riley v. National Federation of the Blind of N.C.*, 487 U.S. at 800; *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981).[15] In *Riley*, the Court found that the speech compelled by the North Carolina statute was unduly burdensome and not narrowly tailored because other provisions of the North Carolina law required professional fundraisers to file financial disclosure forms that detailed the share of funds allocated to overhead as opposed to charity. Publications *by the state* of that detailed information would serve the same public information, anti-deception purpose "without burdening a speaker with unwanted speech during the course of a solicitation." *Riley, supra*, 487 U.S. at 800. See also *Citizens Against Rent Control v. City of Berkeley, supra* 454 U.S. at 298.

Section 84305 is not narrowly tailored because California can and does require those who make expenditures for campaign speech to file detailed campaign finance disclosure forms. The information provided on those

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[15] In *Citizens Against Rent Control v. Berkeley, supra*, this Court held that a city's $250 limit on contributions to local ballot measure committees contravened First Amendment speech and association rights, where a companion provision requiring the city to publish lists of contributors before each election obviated the risk that "voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure . . . ." *Id.*, 454 U.S. at 298.

forms is sufficient to enable the state to achieve the statute's purported purpose of identifying those who support or control the candidate or ballot measure committee—that is their financial backers. Each contribution or expenditure totalling $100 or more must be identified by the name and address of the contributor or of the person paid, the object or purpose for which an expenditure was made, and the amount of the contribution or the expenditure. § 84211. Campaign contribution and expenditure reports must be filed regularly, including pre-election reports, in the jurisdiction where the committee has been active in supporting or opposing candidates or ballot measures. §§ 84200-84219.[16]

The detailed information contained in these campaign finance reports is also more than sufficient for the other purpose the California Supreme Court found to be served by Section 84305: giving California's voters a mechanism by which they may better evaluate [the] validity of a political message. See *Griset v. Fair Political Practices Comm., supra* 8 Cal.4th 851, 865. [see Petitioners' Appendix A, p. A-17.] As in *Riley* and *Citizens Against Rent Control v. Berkeley*, California could, if it chose, publish the information from the campaign finance statements in order to achieve that voter education purpose.

Reporting requirements are thus a readily available and much less intrusive means of achieving the state's goals of educating the public and protecting it from fraud and deception. *Riley*, 487 U.S. at 800; *cf. Citizens Against*

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[16] California law requires candidates, ballot measure proponents and opponents, and political action committees to file comprehensive pre-election campaign finance statements approximately two months and again twelve days before each election, and requires disclosure within twenty-four hours if "late contributions" or "late independent expenditures" are made in the final days before an election. *See* Calif. Gov't Code §§ 84200.5, 84200.7, 84200.8, 84203, 84203.5. This Court upheld similar campaign finance filing requirements for federal elections in *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976).

Rent Control v. Berkeley, 454 U.S. at 298. Assuming *arguendo* that identification, on the mailing itself, of the "sender" of a political mass mailing, might be a more efficient means for California to educate voters or identify those who distribute false statements, it is still beside the point. As this Court declared in striking down another portion of the North Carolina charitable solicitation law,

> . . . North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. [Citation omitted.] If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency. [Citations.]

Riley, 487 U.S. at 795.

The *Riley* decision is thus fully consistent with both *Talley v. State of California, supra*, which struck down a law requiring identification in a speaker's own advocacy materials, and *Buckley v. Valeo, supra*, which upheld campaign finance report filing requirements. Public filing requirements like those upheld in *Buckley v. Valeo* do not impose unwanted speech on a private speaker's own communications to the public. Such filing requirements are constitutional if supported by a compelling public purpose. On the other hand, statutes such as the charitable-share disclosure requirement invalidated in *Riley* or the speaker identification requirement in Section 84305, directly burden speech. When less burdensome alternatives exist, Section 84305's forms of compelled speech cannot withstand exacting First Amendment scrutiny.

B. No Sufficiently Compelling State Interest Has Been Advanced to Justify Compelled Speaker Identification in Political Speech.

Amicus CPAA agrees with Petitioners that the California court erred in finding that the state's interest in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity to be sufficient to justify compelled speaker identification.

Petitioners correctly point out that the voters who hear an anonymous message should be entitled to evaluate all aspects of it, including its source, whether anonymous or not. (Petition, pp. 11-12.)

The Section 84305 scheme requires, in the guise of a speaker identification requirement, disclosure of the speaker's affiliations. Political speakers are compelled to identify on their mailings not only themselves but also those with whom they are associated, and often in a manner that conveys a misleading and politically detrimental impression of the prominence of the role played in the committee by the "sponsor" or "controlling" individual.[17] The result goes beyond mere identification to burden the speaker's message with what may be an unwanted message about the speaker's affiliations.

C. Speaker Identification Statutes Which Are Inherently Overbroad Cannot Realistically Be Narrowly Tailored to Cover Only Speech that May Be Regulated.

The California court also found that Section 84305 serves to identify persons who send arguably false, misleading or deceptive statements and that identification of such persons is a sufficiently compelling reason to justify the statute's infringement on rights protected by the First Amendment. *Griset, supra,* 8 Cal.4th at 865. (Petitioners' Appendix at A-14-16.) The proper analysis of this conten-

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[17] For examle, the FPPC, interpreting the "sponsored committee" and "controlled committee" provisions, directed a committee formed to oppose a local ballot measure to identify itself as a committee "controlled" by an elected county supervisor and not as a "sponsored committee." This interpretation was made notwithstanding the fact that the county supervisor was one of sixteen members of the committee's steering committee, thirteen of the other members served in a representative capacity on behalf of the American Lung Association, the American Heart Association, the American Cancer Society, and a variety of other nonprofit organizations, and the nonprofit organizations were significant contributors to the committee. *See Olson* Advice Letter, Calif. FPPC No. A-89-304 (6/19/89).

tion, however, is not whether the state has a compelling interest in prohibiting false statements in political campaigns, but whether the speaker identification requirement is narrowly tailored to that end.

This is precisely the same problem that this Court held required invalidation of the speaker identification requirement in *Talley*:

> "Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance *is in no manner so limited,* nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these are any other supposed evils. [362 U.S. at 64 (emphasis added).]

Section 84305 has the same problem as did the speaker identification ordinance invalidated in *Talley*: it is impermissibly overbroad. It must be invalidated for that reason alone. The result of California's complex statutory scheme and the FPPC's policy of rigid, hypertechnical, absolute-liability enforcement is to require any citizen who wants to be heard in state or local political campaigns in California either to become thoroughly familiar with a set of statutes and regulations that is difficult for experienced attorneys (even the state's judges) to master, or to engage legal counsel to advise on compliance. Hiring an attorney, however, should not be a condition of safely exercising one's First Amendment right to unfettered political expression.

CONCLUSION

For the reasons stated above, this Court should grant Petitioners' Petition for a Writ of Certiorari so that this matter may be considered in full.

Respectfully submitted,

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